In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 344

JOHN ARBULICH, JR., *Petitioner,*

vs.

THOMAS ARBULICH, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

STATEMENT OF FACTS.

Charles J. Arbulich, a native of Yugoslavia and a naturalized citizen of the United States, died testate in the City and County of San Francisco, State of California, on March 21, 1947, and at the time of

his death he was a resident of the City and County of San Francisco. Under the terms of his last will and testament dated January 23, 1940, which was admitted to probate in the Superior Court of the State of California, in and for the City and County of San Francisco, he bequeathed all of his estate to his father, and in the event that his father predeceased him, he bequeathed all of his estate to his brother, John Arbulich, Jr., a resident and national of the Federal Peoples Republic of Yugoslavia. The father predeceased the testator. The decedent left as his sole heirs at law, two brothers, to wit, the said petitioner, John Arbulich, Jr., and the respondent, Thomas S. Arbulich, who is a resident of the State of California, and a naturalized citizen of the United States. Decedent's estate consisted of real and personal property, all of which was situated in the City and County of San Francisco.

A petition to determine heirship was filed by Thomas S. Arbulich and a similar petition was also filed by V. M. Vukmirovich, Consul General of the Federal Peoples Republic of Yugoslavia, on behalf of John Arbulich, Jr., although he had no power of attorney from John Arbulich, Jr., to represent him. The petitions were consolidated for hearing.

The trial Court rendered judgment pursuant to findings of fact and conclusions of law, decreeing that said John Arbulich, Jr., a citizen and national of Yugoslavia, does not have the right to take the real or personal property of said estate of said decedent,

and that Thomas S. Arbulich is entitled to succeed to, and have distributed to him, all of said estate.

The judgment of the trial Court was upheld by the Supreme Court of the State of California, and a petition for a writ of certiorari has been sought and the respondent submits this opposing brief.

I.

TREATY OF 1881 BETWEEN UNITED STATES AND SERBIA APPLIES ONLY TO "CITIZENS OF THE UNITED STATES IN SERBIA AND SERBIAN SUBJECTS IN THE UNITED STATES.

(a) The petition is based on the assumption that the treaty of commerce between the United States and Serbia entered into in 1881, is applicable to the facts in the Arbulich case.

This treaty was the only treaty introduced into evidence and Article II, the section relied upon, reads as follows:

> "In all that concerns the right of acquiring, or possessing or disposing of every kind of property, real or personal, *citizens of the United States in Serbia and Serbian subjects in the United States,* shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.
>
> "*Within these limits,* and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament,

inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored state.

"They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subject to pay any other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favored state."

The emphasized language of the foregoing Article specifically refers to and limits the right of the treaty to

"Citizens of the United States *in Serbia* and Serbian subjects *in the United States.*"

Article II applies solely to that situation by further confining the issues by the words "*within these limits and under the same conditions* * * *." In the case at issue the decedent was a naturalized citizen of the United States and a resident of the State of California. His estate consisted of both real and personal property situated therein. The petitioner herein is a Yugoslav citizen residing in Yugoslavia. The situation of a citizen of the United States residing in the United States, or a citizen of Yugoslavia residing in Yugoslavia, disposing of his property by will or inheritance to a citizen or resident of the other, is not covered by this treaty.

The State Supreme Court in this connection ruled as follows:

"Appellant contends, nevertheless, that the provisions of article II of a treaty entered into in 1881 between the United States and the Kingdom of Serbia (of which the present Republic of Yugoslavia is the successor government) and certified by the Secretary of State of the United States as remaining in full force and effect between this country and Yugoslavia, are applicable and controlling in appellant's favor on the issue of reciprocity. It may be noted that the first paragraph of article II seemingly treats only of 'citizens of the United States in Serbia (Yugoslavia) and Serbian (Yugoslav) subjects in the United States,' rather than, as in the situation in the present case, of a United States citizen who dies in the United States and leaves property to a Yugoslav subject who is *in Yugoslavia,* and therefore is not here applicable." (R. pp. 177-178.)

(b) The opinion of the California Supreme Court is in accord with the decision of the United States Supreme Court in *Clark v. Allen,* 337 U.S. 503, when it interpreted a similar provision of the treaty between the United States and Germany.

The provisions of the German treaty in said case provided as follows:

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind *within the territories of the other,* by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may

take possession thereof, either by themselves, or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

The Court, at page 515, said:

"A practically identical provision of the Treaty of (April 10) 1844 with Wurtemberg, Art. III, 8 Stat. 588, 590, was before the Court in *Frederickson v. Louisiana*, 23 How. (US) 445, 16 L. Ed. 577. In that case the testator was a citizen of the United States, his legatees being citizens and residents of Wurttemberg, Louisiana, where the testator was domiciled, levied a succession tax of 10 per cent on legatees not domiciled in the United States. The Court held that the treaty did not cover the 'case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other * * *' pp. 447, 448. That decision was made in 1860. In 1917 the Court followed it in cases involving three other treaties. Peterson v. Iowa, 245 US 176, 62 L. Ed. 228, 38 S. Ct. 111; Skarderud v. Tax Commission, 245 US 633, 62 L. Ed. 522, 38 S. Ct. 133."

The Court, at page 516, said:

"We accordingly hold that Article IV of the treaty does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals."

Another serious question arises in that our Senate did not confirm the action of our State Department in extending the treaty of 1881 between United States and Serbia to the Federal Peoples Republic of Yugoslavia, which has a different form of government, and includes different people and territory. See *Artukovic v. Boyle* (107 Fed. Sup. 11, Art. 2, Sec. 2, Clause 2, Constitution of the United States). It is not necessary to urge this point, because the terms of the treaty do not apply to the *Arbulich* case.

II.

TREATY DOES NOT APPLY AND OTHER ARGUMENTS ARE IRRELEVANT.

(a) The petitioner contends that the evidence given by the Yugoslav Ambassador was uncontradicted. This assertion is not true. The judgment of the trial Court and the opinion of the State Supreme Court are both based upon abundant evidence that is in conflict with the testimony of the Ambassador. In that connection the Supreme Court said:

> "Testimony by the Ambassador of Yugoslavia * * * serves at most to create a conflict in evidence as to the ultimate fact and is not controlling on the issue of reciprocity." (R. p. 178.)

(b) The judgment of the trial Court and the decision of the State Supreme Court are both based upon abundant evidence. Statements or inferences

in the petition to the contrary are unfounded. In this connection the State Supreme Court said:

> "Aside from the expression of opinion, a copy of the Yugoslav Constitution, as hereinabove mentioned, and copies of Yugoslav decrees governing transactions with foreign countries and their nationals were received in evidence without objection, and such Constitution and decrees in themselves support the finding of the trial court that reciprocity did not exist with respect to personal property * * *". (R. p. 179.)

After summarizing the documentary evidence included in four exhibits, the Supreme Court said:

> "It is apparent that the evidence summarized hereinabove is sufficient to support a finding that on the date of decedent's death in 1947 reciprocal rights did not exist with respect to real property.' (R. p. 176.)

(c) The only treaty offered in evidence was the treaty with Serbia, which has been mentioned heretofore. The other treaties mentioned in the petition were not even mentioned during the trial and the Bretton Woods Agreement was mentioned for the first time in a petition for rehearing by the petitioner herein after the State Supreme Court had decided the case.

Such matters, one based on conflicting evidence, and the other not raised until after the State Supreme Court rendered its decision, should not be considered by this Court.

CONCLUSION.

I respectfully submit that the petition for a writ of certiorari herein is based upon petitioner's interpretation of a treaty that is not in harmony with this Court's interpretation of a similar treaty in *Clark v. Allen, supra,* upon treaties not introduced into evidence or relied upon during the trial, upon evidence which served at most to create a conflict, and upon issues not presented or relied upon prior to the decision of the California Supreme Court. Under the law and the rules of this court, the petition should be denied.

Dated, San Francisco, California,
November 16, 1953.

Respectfully submitted,
FRANK J. O'BRIEN,
Attorney for Respondent.